Precedent versus gravitational force of courts decisions

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PRECEDENT VERSUS GRAVITATIONAL FORCE OF COURT DECISIONS IN BELGIUM : BETWEEN THEORY, LAW, AND FACTS

BY

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I. – Setting the stage

Something paradoxically happens when 'civil law' lawyers speak about the status of court decisions. Although in many countries, including Belgium, they do not enjoy any formal recognition as a source of law, many in the legal profession, including academics, are referring to them as constituting binding legal norms.

In this article, I wish to examine if this paradox can be explained, and if so, what is, or what should be, the role played by court decisions in the development of the law. In so doing, I will focus mainly on the position which applies in the jurisdiction with which I am the most familiar, i.e. that of Belgium. In particular, the following issues will be examined for this purpose : what is the basis for the authority of court decisions (section II), what is the current state of Belgian law on this matter (section III) and, finally, what should be the future direction taken by Belgium on this subject (section IV)? The theories and opinions which I will develop in this regard are based on the position which prevails in private law, and therefore, I do not claim that the scope of my conclusions reaches any further than this area of the law.

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II. – Precedent vs. gravitational force of court decisions : theoretical foundations

When dealing with the topic which is central to this article, reference is often made to the so-called *precedential force* of court decisions. This term is mostly used as a kind of catch-all phrase covering two – in my opinion – conceptually separate notions, i.e. court decisions as «precedents as such» on the one hand, and what we might call the «gravitational force» (2) of court decisions on the other hand. It is therefore advisable to use the appropriate terminology from the onset. In the case of force of precedent, we are dealing with the formally binding nature of previous court decisions. This is the position which applies in the majority of common law jurisdictions. It is also sometimes expressed by means of the phrase *stare decisis et quieta non movere* – which can be translated loosely as «adhering to what has been decided and refraining from moving what has come to rest.» This doctrine requires that, under certain circumstances, the *ratio decidendi*, and only the *ratio decidendi,* which is contained in a court decision – i.e., the precedent – *must* be followed in all later cases which are in relevant aspects similar to the precedent (3). The important point is that the doctrine of precedent thus constitutes a legal obligation that the precedent be followed in later similar cases, and that it does not just constitute a guideline. Under any legal system which is formally based on the *stare decisis* principle, the court decision has *authoritative formality* (4).

This situation should be distinguished from that which could be described as the *gravitational force* of court decisions. Here, we are dealing with a situation in which court decisions are vested with a certain normative authority without actually making them formally (legally) binding. This normative authority (and herein resides the difference with the force of precedent) is 'accepted' rather than enforced. By this I mean that this authority is accepted

(2) This phrase is borrowed from R. DWORKIN, *Taking Rights Seriously*, Cambridge (Massachusetts), Harvard University Press, 1977, 113.

(3) When I write about the binding force of precedent in this article, I am as a matter of fact focusing on the binding force of the *ratio decidendi*.

(4) P.S. ATIYAH en R.S. SUMMERS, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*, Oxford, Oxford University Press, 1987, 115.

because it is persuasive, and not simply because it emanated from an officially-recognised body or institution such as a court. Force of precedent is therefore a formal phenomenon, whereas gravitational force is a substantive phenomenon : the former relates to the form of the court decision, whereas the latter relates to the content of it. Moreover, force of precedent is, in practice, narrowly linked to the facts of the case, whereas this is usually not the case with gravitational force.

Remarkably enough, given that we are dealing with two *conceptually* different phenomena, many leading authors, particularly in the field of comparative law, fail to make a terminological and sometimes even a conceptual distinction between these two notions. The point is that these distinctions are hardly ever being taken seriously. A witness in this regard is the following quotation, taken from the editors of an authoritative work on the subject under review here :

«[P]recedent now plays a significant part in legal decision making and the development of law in all the countries and legal traditions we have reviewed. This is so whether or not precedent is officially recognised as formally binding or merely as having other normative force of some degree. For historic reasons, certain legal systems formally discourage or even discountenance the open citation of precedents in judgments at the highest levels. But even in these cases, precedent in fact plays a crucial role.» (5)

In my view, the content of this quotation is misleading because its authors use the term «precedent» in such a way as to cover the two phenomena described above. Admittedly, both phenomena may in practice be related and even overlap, but they remain conceptually separate nevertheless. This lack of conceptual distinction is particularly problematic because the basis for the force of precedent is different from that which underlies the gravitational force of court decisions. And this is related to the fact that one of these terms, gravitational force, relates to a phenomenon which appears to be a logical necessity of any reasoning process, whereas the other, force of precedent, concerns, as mentioned, a position

(5) D.N. MACCORMICK en R.S. SUMMERS, «Further General Reflections and Conclusions», in D.N. MACCORMICK en R.S. SUMMERS, *Interpreting Precedents: A Comparative Study*, Dartmouth, Aldershot, 1997, 531-532.

which is deliberately imposed by law. Moreover, a system based on binding precedents as such will have to be embedded in a particular institutional framework, which seems to a large extent absent in many so-called civil law countries. One of my positions is therefore that in many civil law countries, it would be impossible for a *fully developed* legal system based on force of precedent to even exist. In the last section of this article I will add a few words on this.

A. – Court decisions as precedents

What, then, are the normative foundations for a system of binding precedent, and why should a system of binding precedent be introduced?

1. – *The equality principle as consistency*

Many authors have cited the equality principle as an explanation for the fact that court decisions actually have force of precedent – or in any case that they should have it. At first sight, this principle does indeed appear to present a convincing reason for adjudicating case A2, which presents material similarities with case A1, in the same manner as A1. Karl Llewellyn explained it in the following terms:

«Towards its [precedent, MA] operative drive all those phases of human make-up which build habit in the individual and institutions in the group: laziness as to the reworking of a problem once solved, the time and energy saved by routine, especially under any pressure of business; the values of routine as a curb on arbitrariness and as a prop of weakness, inexperience and instability; the social venues of predictability; the power of whatever exists to produce expectations and the power of expectations to become normative. *The force of precedent is heightened by an additional factor: that curious, almost universal, sense of justice which urges that all men are properly to be treated alike in like circumstances.*» (6)

(6) K. Llewellyn, «Case Law», in *Encyclopedia of Social Sciences*, Vol. 3, New York, MacMillan, 1930, 249 (emphasis added). Also for example M. Moore, «Precedent, Induction, and Ethical Generalization», in *Precedent in Law*, L. Goldstein (ed.), Oxford, Oxford University Press, 1987, 186, and R. Cross en J.W. Harris, *Precedent in English Law*, Oxford, Oxford University Press, 1991, 3.

Whether or not this explanation by Llewellyn is correct depends, however, on what is meant here by the equality principle. Precedents constitute a temporal criterion, in the sense of being a fixed yardstick for the adjudication of future disputes. Therefore, if we conceive the equality principle as one which seeks to impart temporal *consistency*, it can definitely form a basis for giving court decisions force of precedent.

But the equality principle can also be conceived in a different way, i.e. one which might be contrary to the temporal effect of the force of precedent. Thus, for example, H.L.A Hart argues that the narrow link between justice in judicial adjudication on the one hand, and the application of a legal rule as such on the other hand, has led some authors to treat both aspects as being one and the same, adding :

«Yet plainly this is an error unless «law» is given some specially wide meaning : for such an account of justice leaves unexplained the fact that criticism in the name of justice [i.e. 'treating like cases alike'] is not confined to the administration of the law in particular cases, but the laws themselves are often criticised as just or unjust. Indeed, there is no absurdity in conceding that an unjust law forbidding the access of coloured persons to the parks has been justly administered, in that only persons genuinely guilty of breaking the law were punished for it and then only after a fair trial.» (7)

Here, Hart makes a clear distinction between what we mostly refer to as «equality before the law» as opposed to «equality through the law». Whereas the former relates to the consistent application of legal rules in time, the second concerns the substance and quality of the rule as such (justice as to its substance or rationality). Therefore, the notion of precedent is non-neutral in relation to the question as to which of the two cases constitutes the correct decision or criterion – since it is the first-decided case which clearly represents the criterion. It is, however, neutral in relation to the substance of these cases, since it provides no information on the degree of justice or rationality (in the Hartian sense) which was done in the first or in the second case.

However, the equality principle – at least within the meaning attributed to it by Hart – is precisely neutral in principle in relation

(7) H.L.A. HART, *The Concept of Law*, Oxford, Oxford University Press, 1961, 157.

to the various decisions (both the first and the second case *could* constitute the yardstick to be followed), but not in relation to the substance of these cases. If understood in this way, it would be difficult for the force of precedent of court decisions to have a normative basis in the principle of equality as understood by Hart. Where all members of a certain group have been subjected to treatment which is obviously discriminatory, as would be the case for a rule under which all red-haired persons on earth were to be subjected to slavery, such treatment does not become any less unjust because perfect equality has been observed as between all red-haired persons on earth. In short, the precedent principle results in inter-temporal equality, but this can be at the expense of non-temporal justice under the equality principle in the second meaning described above. Therefore, only if it is understood as (an element of) consistency, the equality principle could be regarded as a basis for the force of precedent of court decisions.

2. – *Legal certainty and procedural economy*

Another argument which is regularly advanced to explain the force of precedent, relates to the value of legal certainty. In order to engage in, for example, financial transactions, it is necessary for the parties involved to be able to rely on a legal system which guarantees certainty. The case law must be stable in the sense of being uniform and continuous if it is to provide the necessary degree of certainty. The link with the notion of precedent appears to be clear: where a court is required to decide a new case in the same way as this was done previously, a system of binding precedent provides a certain degree of stability and certainty. As a matter of fact, this basis for the force of precedent of court decisions is the same as that which underlies the consistency principle, as discussed in the previous paragraph.

Karl Llewellyn, the American 'legal realist' previously referred to, has written that, in addition to a number of other factors which are capable of explaining the force of precedent of court decisions, the «laziness as to the reworking of a problem once solved» and the «time and energy saved by routine» are also important considerations for a system of binding precedent (8). Although the «laziness» element has negative overtones, it is the next phrase («the time and

(8) K. LLEWELLYN, *l.c.*, 249.

energy saved by routine») which tells us what Llewellyn is referring to here – i.e., considerations of procedural economy or procedural efficiency. If a court was required to consider and assess afresh all the possible outcomes of each individual case it was dealing with, the administration of justice would become too time-consuming, and the parties involved would have to wait too long – or should we say, even longer – for a result. Efficient court proceedings ultimately save time for both the judiciary and the parties involved. Therefore, why not operate efficiently and follow the example of previous similar cases? «[A] decisionmaker choosing to rely on precedent may justifiably «relax,» in the sense of engaging in less scrutiny of the case. And where a *rule* of precedent urges a decisionmaker to relax in this sense, the net product will be a substantial reduction on the decisionmaking effort.» (9)

3. – *The principle of reliance*

The difference between the principle of reliance and that of legal certainty as a foundation for the force of precedent of judicial decisions is a subtle one, and some authors place these two concepts under the same heading. Wasserstrom explains the difference in the following terms :

«[I]f the failure to provide certainty might make the legal system a less useful institution, the failure to give effect to those activities which were undertaken *in justified reliance* upon the pronouncements of that system could serve, arguably, only to make the system ill-conceived, irresponsible and vicious.» (10)

Therefore, whereas the principle of legal certainty concerns the need for a necessary condition to be met if the legal system is to be able to function at all, the principle of reliance (or : legitimate expectation) seeks to ensure that this condition is not infringed in concrete cases – and more particularly that it is not infringed once expectations have been aroused. As is the case with legal certainty, the principle of reliance concerns the requirement that the legal consequences of a certain action may not be subject to constant

(9) F. SCHAUER, «Precedent», *Stanford Law Review* 1987, 599.

(10) R.A. WASSERSTROM, *The Judicial Decision: Toward a Theory of Legal Justification*, Stanford, Stanford University Press, 1961, 67.

change. Seen from this point of view, the principle of reliance also offers a reason why court decisions should have force of precedent.

B. – Gravitational force of court decisions : the assumed rationality of court decisions

It is interesting to note that the reasons justifying the force of precedent of court decisions are all of a formal nature. They provide a reason for following court decisions, but these reasons do not in any way concern the contents of the court decisions in question. This fact identifies precisely the limits of these arguments in favour of a system of precedent : following precedent on formal grounds can produce results which are substantively less satisfactory, because the precedent might not represent justice as to its substance. «To be content with certainty as the major attribute is to demand only that results be predictable prior to their occurrence. It is to leave open the question of the nature of these results which are to be repeated in an orderly, ascertainable pattern. Like so many other purely formal requirements, it can all too easily be confused with those that are substantive.» (11)

The principles which were dealt with above are accordingly concerned with the stable operation of the law as a system, and concern the achievement of what Fuller describes as the «inner morality of law,» (12) i.e., a procedural morality whose acceptance constitutes an important, but by no means sufficient condition for the achievement of justice. But without a universal answer to the question of whether stability is a good thing as such, we cannot decide whether decision-making according to precedent is desirable :

«Stability may be unimpeachable in the abstract, but in reality stability comes only by giving up some of our flexibility to explore fully the deepest corners of the events now before us. Whether this price is worth paying will vary with the purpose to be served within a decisional domain, and we get no closer to knowing those purposes by understanding the relationship between stability and categorical size. Still, focusing on this relationship is valuable, because

(11) R.A. Wasserstrom, *o.c.*, 63.
(12) L.L. Fuller, *The Morality of Law*, New Haven, Yale University Press, 1969, 168.

it enables us to see more clearly just how stability is achieved and just what kind of price we must pay to obtain it.» (13)

Therefore, it seems that the arguments on which the reasons for a system of binding precedent (referred to above) rest on the assumption that the obligation to follow court decisions will not bring about excessive distortions. Why, then, would such an assumption be right? MacCormick's comments on this issue are highly relevant here:

«[I regard] the choice to observe formal justice in such matters as a choice between the rational and the arbitrary in the conduct of human affairs, and in asserting it as a fundamental principle that human beings ought to be rational rather than arbitrary in the conduct of their public and social affairs (...) To somebody who disputes that principle with me, I can indeed resort only to a Humean argument: our society is either organized according to that value of rationality or it is not, and I cannot contemplate without revulsion the uncertainty and insecurity of an arbitrarily run society, in which decisions of all kinds are settled on somebody's whim or caprice of the moment, without reference to past or future decision making.» (14)

This statement is clearly based on the assumption that court decisions are deemed to have been made in a rational manner. In other words: judicial decisions are expected to be rational, as a result of which it may reasonably be assumed that the reasons which have been given earlier to arrive at a certain court decision continue to be relevant now. The interesting thing here is that this argumentation by MacCormick is fundamentally different from the other arguments used in favour of precedent: the principles of consistency, legal certainty, procedural economy and efficiency, and reliance, all provide an explanation as to why judicial decisions *should have* force of precedent. But when we focus on the idea of court decisions being of a rational nature, this can explain why judicial decisions actually do possess gravitational force. Accordingly, Wasserstrom is correct when he states that «precedent is, for the case in which it was originally applied, the reason (or a reason)

(13) F. SCHAUER, «Precedent», *Stanford Law Review*, 1987, 602.

(14) N. MACCORMICK, *Legal Reasoning and Legal Theory*, Oxford, Oxford University Press, 1978, 76-77.

given by the court for its decision.» (15) It is here that we find, in my opinion, the essence of the gravitational force of court decisions – i.e., in the *ratio being the rule*. In the light of this argumentation a court decision will only be rational where it can be – *inter alia* – applied in a rule-like manner. To put it differently : «Every speaker may assert only those value judgments or judgments of obligation in a given case which he or she is willing to assert in the same terms for every case which resembles the given case in all relevant respects,» R. Alexy writes (16). By advancing this argument, reference is made to the universalizability theory developed by the English moral philosopher R.M. Hare. Hare defends the theory that the principle of universalizability is a general principle which buttresses moral arguments.

Hare's theory is also helpful to explain why court decisions have gravitational force (17), because one of the most significant conclusions to be drawn from his analysis of the use of moral language is that there exists a narrow link between *descriptive* and *prescriptive* (i.e. evaluative) statements. On the basis of this distinction, two foundations of moral reasoning arise : (a) *the principle of universalisability* and (b) the *prescriptivity principle*. When we make the descriptive statement that «a is red,» we must, according to Hare, also accept that every other object which is identical to «a» in all its relevant aspects will also be red. The statement «this is red» therefore also implies the statement «everything which resembles this in its relevant aspects is red.» All those who deny this are using the qualification «red» incorrectly. Hare demonstrates that this argument is valid not only in relation to descriptive statements, but also to prescriptive statements, because the latter also contain descriptive elements. Or to put it differently : where something is described as being «good» this is because of a number of properties or characteristics which are specific to it. Every other object which possesses these properties or characteristics will also need to be qualified as «good.» Hare states :

(15) R.A. Wasserstrom, *o.c.*, 82. Note that Wasserstrom uses the term precedent to refer to the gravitational force of court decisions as well.

(16) R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, Oxford, Oxford University Press, 1989, 190.

(17) R.M. Hare, *Freedom and Reason*, Oxford, Oxford University Press, 1963, 228 p. Also «Universalisability», *Proceedings of the Aristotelian Society*, 1954-55, 295-312.

«We must now notice the connection between the fact that some judgments are descriptive and another feature which it has become the custom to call, when we are speaking of moral judgements, *universalizability*. It is important to emphasize that moral judgements *share* this feature with descriptive judgements (...).» (18)

The fact that «a» has certain properties is therefore the reason why it is qualified as being «good.» From the above statement, Hare rightly draws the conclusion that the universalizability principle is a fundamental principle underlying every rational reasoning process. Accordingly, it will also be a fundamental principle underlying legal argumentation.

«[W]hen we make a moral judgement about something, we make it *because of* the possession by it of certain non-moral properties. Thus (...) we hold that moral judgments about particular things are made for reasons; *and the notion of a reason, as always, brings with it the notion of a rule* which lays down that something is a reason for something else.» (19)

Understood in this manner, the universalizability principle, which assumes the existence of a rule, is a theoretical necessity of the judicial argumentation process. Court decisions should, in principle, be followed because this is assumed by the universalizability principle, which draws on the idea of rationality. The courts are not allowed to argue in one direction one day, and argue in the opposite direction the next.

Nevertheless, it should be permissible to depart from a court decision, because its rationality does not necessarily apply forever, or because the quality of a decision sometimes is, quite simply, weak. It is precisely for this reason that the gravitational force of court decisions do not have the hallmark of absolute correctness (as in a system of binding precedent), but rather a *presumption of correctness*. This presumption of correctness also entails that the rationality of a court decision will constantly need to be assessed (at least in marginal terms : see paragraph IV.d for more on this). It also means that, where a court actually wishes to depart from a judicial decision, the burden of proof will be on that court to demonstrate that there are good grounds for this departure, which

(18) R.M. HARE, *Freedom and Reason*, *o.c.*, 10.
(19) *Ibid.*, 21.

requires, *inter alia*, that requirements of legal certainty and the like are to be weighed up against its substantive requirements of justice.

If the gravitational force of court decisions results from the rationality of the judicial decision, the question naturally arises as to why in the United Kingdom a formal system of binding precedents has been introduced. The reasons for this can, in my opinion, only be fully understood in historical terms. In the common law, it was probably because of the absence of any major codification until well into the Twentieth Century that a system of binding precedents was introduced (20). It would take us too long to go into this aspect in any depth in this article; however, I would point out that the system of precedent as such was, in England, only formally instituted in 1898 on the occasion of the case of *London Tramways v. London County Council*. Lord Halsbury on that occasion wrote that :

«Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgement was erroneous; but what is that occasional interference with what is perhaps abstract justice, as compared with the inconvenience – the disastrous inconvenience – of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final court of appeal. My Lords, 'interest rei publicae' is that there should be 'finis litium' sometime and there can be no 'finis litium' if it were possible to suggest in each case that it might be reargued because it is 'not an ordinary case' whatever that may mean.» (21)

Whether or not this is a convincing argument will be looked at in paragraph IV.b of this article.

(20) On the history of the English system of binding precedent, see T. Ellis Lewis, «The History of Judicial Precedent», *The Law Quarterly Review*, 1930, 207-224 (I) en 341-360 (II), 1931, 411-427 (III) en 1932, 230-247 (IV). Also T.F.T. Plucknett, *A Concise History of the Common Law*, London, Butterworth, 1956, 342-350 and J. Evans, «Change in the Doctrine of Precedent during the Nineteenth Century», in *Precedent in Law*, L. Goldstein (ed.), Oxford, Oxford University Press, 1987, 35-72.

(21) [1898] AC 380. On this, see D. Pugsley, «London Tramways (1898)», *The Journal of Legal History*, 1996, 172-184 and Lord Wright, «Precedents», *The Cambridge Law Journal*, 1944, 120-122.

III. – Does Belgian law present an obstacle to a system of binding precedent or a system of gravitational force of court decisions?

In this section, I will examine the applicable law in Belgium relating to the subject of this article. The concrete question which will be dealt with is the following one : is there anything in Belgian positive law which (a) obstructs or (b) promotes a system of force of precedent or gravitational force ?

A. – Article 6 of the Belgian Code of Civil Procedure

The Belgian courts are not allowed to make decisions by means of general disposition. Article 6 of the Belgian Code of Civil Procedure leaves little doubt on this issue : «The courts may not, in the disputes submitted to them for judgment, make any decision by way of general dispositions qualifying as a rule.» This provision restates Article 5 of the French *Code Civil*, which constituted a reaction against the powers of the *Parlements*, which they acquired under the *Ancien Régime*, to issue, in their capacity of supreme courts, so-called *arrêts de règlement*. These *arrêts* not only applied to the concrete disputes which were settled by them, but, in the same way as legislation, were also aimed at the future and had an *erga omnes* effect. In general terms, they were made whenever an issue arose which gave rise to a new legal problem (22).

There currently exist hardly any direct infringements of Article 6 of the Belgian Code of Civil Procedure. The relevance of this provision results mainly from a number of indirect infringements : the courts may not, in a formal sense, regard themselves as being bound by the previous case law, not even by the decisions of the Supreme Court, since by so doing they would attribute to the case law a general rule-like scope. Because of this rule, the Belgian legal system does not allow a system based on the binding force of precedent – i.e., a system under which court decisions must be followed

(22) On this, see: *Pandectes Belges*, IX, v° «Arrêt de règlement», en VIII, v° «Application de la loi», nrs.7-22; F. Olivier-Martin, *Histoire du droit francais: des origines à la Révolution*, Paris, Domat Montchrestien, 1948, 538 and P. Bellet, «Servitudes et libertés de juge: les articles 4 et 5 du Code Civil Français», in *Arguments d'autorité et arguments de raison en droit*, P. Vassart e.a. (ed.), Brussel, Nemesis, 1988, 145-158.

because they have once been made. However, Article 6 does not in any way form an obstacle to a system based on gravitational force, as long as the court applies the findings of an earlier judicial decision in a reasoned way. Therefore, the reasons advanced by the court when deciding a case may not include that it was decided in a particular way *because* another court had previously made the same judgment. The court may, however, state that it followed an earlier decision because it considered that judgment to be a sound and rational decision. In so doing, the court may even make express reference to previous court decisions.

In this sense, Article 6 has evolved from an application of the principle of separation of law and politics – i.e., the idea that the courts may only apply the law rather than make it – towards a disguised obligation to give reasons. In its current application, it therefore has a narrow link with Article 149 of the Belgian Constitution, which also contains a provision imposing the duty to give reasons for judicial decisions. Viewed in this light, Article 6 may even have a meaningful role to play today.

B. – Article 23 of the Belgian Code of Civil Procedure : res judicata

Article 23 of the Belgian Code of Civil Procedure reads as follows :

«The authority of court decisions shall reach no further than that which constitutes the specific subject-matter of the decision. It shall be a requirement that the case to be decided is the same, that the claim has the same cause, that the claim is instituted between the same parties, and that it has been brought by them and against them in the same capacity.»

The object of this provision is to achieve that one and the same concrete claim will not be brought to a court at the same hierarchical level more than once – *res iudicata pro veritate habetur*. Therefore, once a court has made a decision in a specific case, that decision can no longer be challenged by a judicial body of the same or of a lower level (23). The object of this provision is to prevent a specific lawsuit from taking an eternity to be decided.

(23) Article 23 of the Article of the Belgian Code of Civil Procedure of course does not prevent any appeal procedure.

The late Belgian scholar Kruithof has expressed the view that both the letter and the spirit of Article 23 of the Belgian Code of Civil Procedure would – *inter alia* – constitute an obstacle to the force of precedent and even to the gravitational force of court decisions (24). I do not share this view. The *res judicata* doctrine essentially has little to do with the subject-matter under discussion in this article. I can see at least three points of difference between the *res judicata* doctrine on the one hand, and the doctrine of force of precedent or gravitational force on the other (25).

Res judicata relates, first, to the decision made in a specific case, whereas the force of precedent and gravitational force of court decisions relates to the more general legal considerations – *ratio decidendi* – which follow from a judicial decision. Precedent and gravitational force thus reach further when compared to the doctrine of *res judicata*. Secondly, *res judicata* merely applies to the parties involved in a concrete dispute and their heirs, whereas the force of precedent and gravitational force of a decision has, in principle, an effect *erga omnes*. Finally, *substantial res judicata* enters into effect as from the moment when the decision was made (see Article 24 of the Belgian Code of Civil Procedure), but the latter only acquires *formal res judicata* once the decision is no longer capable of judicial review or appeal (see Article 28 of the Belgian Code of Civil Procedure). The force of precedent and gravitational force of a court decision, on the other hand, will in principle enter into effect immediately, i.e. as from the time when the *ratio decidendi* was stated.

C. – Articles 84 and 133 of the Belgian Constitution

The doctrine which seeks to exclude the courts from taking part in the rule-making process, i.e., the separation of powers, may also find confirmation in two provisions of the Belgian Constitution: Articles 84 and 144, which state that it is only a statute or decree which may provide an authentic (i.e. generally binding) interpretation of a legislative instrument. According to the spirit of these constitutional provisions, it is the author of the legislation who is best

(24) R. Kruithof, «Naar een 'Gouvernement des juges' in het Belgische verbintenissenrecht?», in *Hulde aan prof. dr. R. Kruithof*, Antwerpen/Brussel, Maklu/Bruylant, 1992, 56-58.
(25) Compare R.W.M. Dias, *Jurisprudence*, London, Butterworths, 1985, 126-127.

placed to interpret it. *Ejus est legem interpretari, cujus est condere.* As a consequence, the judiciary would be barred from any participation in the rule-making process.

The courts are obviously bound to act in accordance with an interpretative statute, even where the interpretation made by statute or decree goes against earlier interpretation by the courts. Article 7 of the Belgian Code of Civil Procedure therefore states that the courts are bound to «act in accordance with the interpretative Laws where definitive ruling has not been given on a point of law at the time when these interpretative Laws had become binding.» However, this amounts to no more than confirming the supremacy of legislation within the Belgian legal system, rather than acknowledging that court decisions have no part to play in this system.

D. – Appeals, applications to the Supreme Court, and 'Supreme Court review in the legal interest'

As we have just seen, a system of binding precedent is not possible in Belgium. However, it is possible to find in Belgian positive law a number of provisions – i.e., provisions which allow the possibility to appeal a decision in a higher court and with applications to the Supreme Court, i.e. provisions that can be found in virtually any jurisdiction in the western world – from which it might be concluded that the Belgian legal system seeks to promote the supposed rational unity of the system. In more concrete terms this means that where mistakes and anomalies in the legal system exist, either actually or potentially (for example, because previous court decisions are not being followed), these provisions provide institutionalised opportunities to remove such problems from the system. Viewed in this light, all these provisions are based on the notion that the legal system seeks to achieve or consolidate its rationality. To this extent these provisions share the consequences of the way in which we assess the value of judicial decisions.

Furthermore, the institution of *Supreme Court review in the interests of the law* provides, in my opinion, even clearer evidence of the fact that the legislature has sought to acknowledge the implications of the need for rationality in the legal system. From Article 1089 of the Belgian Code of Civil Procedure itself, the objectives of this procedure clearly emerge, i.e., to wit the promotion of legal unity :

«Decisions made at last instance which are contrary to the relevant laws or procedures, and against which none of the parties applied for review within the statutory time limit, shall be challenged *ex officio* before the Supreme Court by the State Prosecutor.»

This provision has introduced the possibility of Supreme Court review even when the parties involved have failed to apply for it. Such a review is purely dogmatic, and will only be pronounced in the interests of the law and its future observance. Article 1089 may only be relied upon when no further judicial remedy is available to the parties. This provision therefore is intended to be an instrument which seeks to discourage undesirable court decisions in the future and to prevent the courts from being influenced by a theory which has been accepted by a certain body of court decisions. Viewed in this light, court decisions which are the result of 'Supreme Court review made in the interests of the law' can to a certain extent be expressly regarded as precedents (26). That the significance of this provision is purely dogmatic also emerges explicitly from the fact that the parties involved may not rely on an Article 1089 review in order to be exempted from the rulings contained in the annulled decision.

However, one might argue than an action seeking Supreme Court review on the basis of Article 1089 of the Belgian Code of Civil Procedure will not be based on an infringement of the relevant case law, but on the violation of a concrete legislative provision, because it is the latter – the significance or scope of which had been misapplied in a court decision – which is the formally binding instrument. This fact illustrates one of the limitations of Article 1089 of the Belgian Code of Civil Procedure, for if a judicial decision is not based on a legislative provision, this procedure cannot be applied. Nevertheless, it is in a court decision itself that a rule finds concrete significance.

(26) Rigaux thus underlines the «caractère *disciplinaire*» of this procedure. F. RIGAUX, *La nature du contrôle de la Cour de cassation*, Brussel, Bruylant, 1966, 15. Paradoxically, this procedure leads in effect to so-called «arrêts de règlement», which from a historical point of view were the main reason why Article 6 of the Belgian Code of Civil Procedure was introduced. See footnote 25 and accompanying text.

IV. – Towards a culture of gravitational force of court decisions

Should a system based on the force of precedent or on gravitational force also be introduced in Belgium? The answer to this question should depend at least in part on whether or not court decisions are followed up in fact. In any case, I am convinced that, if compliance with court decisions is an outward expression of the rationality of a legal system, it is in general not desirable that authoritative and rational case law should not be followed.

A. – Force of precedent and gravitational force in practice

Remarkably enough, the operation in practice of a system of precedent or even gravitational force has hardly ever been the subject of an in-depth study as such. An interesting example of this is a collection of essays on this topic which has already been referred to, i.e. *Interpreting precedents: A Comparative Study*, edited by D.N. MacCormick and R.S. Summers. I would at this point restate the concluding sentences of this study (which has already been cited in the introduction of paragraph II of this article):

«[P]recedent now plays a significant part in legal decision making and the development of law in all the countries and legal traditions we have reviewed. This is so whether or not precedent is officially recognized as formally binding or merely as having other normative force of some degree. For historic reasons, certain legal systems formally discourage or even discountenance the open citation of precedents in judgments at the highest levels. But even in these cases, precedent in fact plays a crucial role.» (27)

This conclusion is remarkable, because I believe it is impossible to make such an empirical observation on the basis of the analysis performed by the many contributors to that collection of essays: there is not one contribution which examines compliance with court decisions in concrete terms, i.e., empirically on the basis of studying

(27) D.N. Maccormick en R.S. Summers, «Further General Reflections and Conclusions», in D.N. MacCormick en R.S. Summers, *Interpreting Precedents: A Comparative Study*, Dartmouth, Aldershot, 1997, 531-532. On this book also M. Adams, «The Rethoric of Precedent and Comparative Legal Research», *The Modern Law Review*, 1999, 464-468.

expressly the way in which court decisions are followed up in a particular area of the law.

MacCormick and Summers appear to conclude that when, for example, the highest judicial authority, such as the Belgian Supreme Court, frequently follows its own case law a system of precedent exists (or, for that matter, a system of gravitational force). In fact, it would be a somewhat sorry state of affairs if this were not the case. But the crucial thing which has to be observed when drawing conclusions on whether court decisions have gravitational or even precedential effect, is to what extent rational case law penetrates through the whole legal system. The work by MacCormick and Summers is based mainly on the observation that the decisions of the highest courts are followed by the highest courts themselves.

Finally, I would like to mention that I myself carried out an analysis such as the one advocated above in relation to three areas of the Belgian law of torts. My conclusion at the time was that the gravitational force of court decisions was not in the best of health in these areas (28). The reason for this situation appeared to reside in the indifferent level of the reasons given by the Belgian courts for their decisions (29), and the absence of a satisfactory system of case law reporting. These are in my opinion also the two necessary conditions which must be fulfilled for a system based on the force of precedent or the gravitational force of court decisions to have a chance of flourishing. Viewed in this light, the conclusions drawn by MacCormick and Summers are improbable, because many of the legal systems which were looked upon in their collection of essays seem to lack these institutional preconditions.

B. – What is required?

What, then, do we need in Belgium? Would it be wise to introduce a system of binding precedent, based on the *stare decisis*

(28) M. Adams, «Law is as I've told you before», *Tijdschrift voor Privaatrecht* 1997, 1357-1381.
(29) This conclusion also results from a few older studies by the Swiss scholar A.O. Germann, who proves that in Switzerland there exists a strong relation between the way courts give reasons for their decisions and a system of precedent or gravitational force. A.O. Germann, «Präjudizielle Tragweite höchstinstanzlicher Urteile, insbesondere der Urteile des schweiserischen Bundesgerichts», *Zeitschrift für Schweizerisches Recht* 1949, 297-332 en 423-456; Idem, *Präjudizien als Rechtsquelle: eine Studie zu den Methoden der Rechtsfindung*, Stockholm, Almqvist, 1960, 52 p. and Idem, *Durch die Judikatur Erzeugte Rechtsnormen*, Zürich, Schultes, 1976, 36 p.

principle? I would not be in favour of doing this, for a variety of reasons.

The first reason is that, if the rational nature of a court decision brings out its gravitational force, as I have argued, it is not necessary for court decisions to be absolutely binding (which is not to deny the need for a certain culture in which explicit use is made of court decisions, which will be discussed below). I would endorse the comment by Lord Wright in 1944, who himself was a judge in the House of Lords (which in 1944 was not even prepared to overrule its own precedents):

«(...) on balance of social convenience and public welfare it would have been better to have refused to perpetuate [an] erroneous and unjust rule. An occasional re-argument of [a] rule is a small matter compared with the persistent operation of injustice.» (30)

However, independently of these considerations, and in the second instance, even a system of binding precedents cannot provide a guarantee that judicial decisions will be followed with precision. In fact, it can actually give rise to a great degree of confusion as a result of the practice of overdistinguishing. A good example of this is the way in which, in the nineties of the Twentieth Century, the English law developed on the subject of awarding damages for so-called «pure economic loss» – i.e., financial loss which does not result from personal injury or damage to property (31). This, I believe, has shown that, when dealing with a field in which some court decisions are generally felt to be unsatisfactory, a system of binding precedents can have a highly confusing effect. In any case, until the late 1990s this area of the law was governed by a somewhat incoherent set of rules displaying, amongst others, an unclear relationship between the contractual and non-contractual law on the award of damages. Distinguishing often brings relief to such situations, and has proved to be a way of eluding an undesirable prec-

(30) Lord Wright, «Precedents», *The Cambridge Law Journal* 1944, 122. See also the critical comments by Lord Evershed, *The Court of Appeal in England*, London, Athlone Press, 1950, 17-18 and Lord Cohen, «Jurisdiction, Practice and Procedure in the Court of Appeal», *The Cambridge Law Journal* 1951, 11.

(31) On this: J. Stapleton, «Duty of Care and Economic Loss: a Wider Agenda», *The Law Quarterly Review*, 1991, 248-297; Idem, «In Restraint of Tort», in *The Frontiers of Liability*, P. Birks (ed.), Oxford, Oxford University Press, 1994, 83-102, and Idem, «Duty of care: Peripheral Parties and Alternative Opportunities for Deterrence», *The Law Quarterly Review*, 1995, 301-345.

edent, although this naturally creates tensions with the official English doctrine of precedent. At the same time however, too much distinguishing can also create confusion in the law.

Thirdly, I am unwilling to advocate a system of binding precedents because the quality, i.e. the *ratio*, of a precedent is not fixed in advance. In practice, court decisions have no independent value in time regardless of their substantive quality, and the existence of a judicial decision may be an authoritative, but not a decisive, reason for making the same decision as before. In this sense, the scope of a decision should not be fixed in advance. This viewpoint is also consistent with the argument raised previously, that court decisions should merely contain a *presumption of correctness*.

What I would argue for however, is a culture whereby the courts make express use of judicial decisions. This would not make for a system of binding precedent, but would entail that judicial decisions are expressly involved in the process of judicial reasoning. If the law can, next to other things, be described as a culture of argumentation – and there are some reasons for doing so – the debate on the best or the most rational solution to a legal dispute should be *explicitly* based on well-argued and clearly expressed reasons, including a discussion on the rational nature of relevant previous court decisions. The grounds of judgment of a decision should also serve as an instrument for determining the contents of a rule, as developed by the courts.

From this perspective, it is remarkable that the Belgian Supreme Court never cites previous court decisions, even though this would not be contrary to Article 6 of the Belgian Code of Civil Procedure.

On the other hand, and contrary to the Belgian Supreme Court, the lower Belgian courts do occasionally make reference to previous decisions; however, one has the impression that this is done mainly for confirmation purposes, and therefore to substantiate a decision. However, a more systematic use of judicial decisions in the court's grounds of judgment should entail that the court is using the case law both to confirm and to challenge it.

C. – The duty to give reasons

In paragraph IV.A I wrote that one of the main reasons why a system of precedent or even gravitational force cannot function sat-

isfactorily in Belgium is that the courts generally do not elaborate in giving reasons for their decisions. Court decisions in Belgium are mostly presented as misleading syllogisms. Still, the question remains as to under what circumstances courts' grounds of judgment should be more comprehensive? (32) And this question is relevant here because there are certainly no reasons why these grounds of judgment should be more comprehensive or elaborate in all circumstances. This would be unrealistic in view of the practical conditions in which the courts in Belgium make their decisions – there are many hundreds of thousands of decisions per year. But, above all, I am convinced that the majority of cases present no problems, since an adequate knowledge of the relevant legislation, case law, and academic writings would suffice to enable a court to make a decision which is understood and accepted by the legal community. It is unnecessary in these circumstances to search through the entire gamut of legal decision-making techniques and set them out before the reader before arriving at a decision (33).

However, some cases are not problem-free, nor are their solutions obvious, in which situations the courts' grounds of judgment will need to be more comprehensive. For example, the nature of the relevant law and legal area may require grounds of judgment which are more comprehensive. In criminal law, for example, where people are frequently convicted with imprisonment, the demands in regard to the grounds of judgment have to be spelled out in detail. Also, where a court decision is of a radical nature, or has a definitive character, the courts' accountability towards the parties involved will be greater than where this is not the case. A brief syllogism will be inadequate, and the applicable legislation and case law will need to be interpreted in a very concrete and express manner. Also, the procedural context can be relevant for the extent and contents of the duty to give reasons. Thus, the reasons provided in summary proceedings will normally be less extensive than those provided as a result of a full trial.

To the extent that the legal solution of a particular problem has become widely accepted, the court will have little difficulty in align-

(32) On this also J.B.M. VRANKEN, *Algemeen Deel II*, in *Mr.C.Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*, Zwolle, Tjeenk Willink, 1995, 56 n.12, 141-142 en 148-156.

(33) *Ibid.*, 57.

ing its grounds of judgment on this solution : court decisions which confirm a certain state of affairs in a non-controversial area of the law may content themselves thus with a less comprehensive set of reasons. The contrary will obviously apply where this is not the case. In such cases, the court's grounds of judgment will need to enhance the degree of acceptability of a decision. Finally, when the court takes a decision which contributes towards the development of the law, its grounds of judgment will obviously need to be more comprehensive. Developing the law can take various forms : filling voids left by gaps or by the vagueness or open nature of rules, or amending, adjusting, or sharpening the interpretation of case law and legislation. The court must expressly elaborate, and give express reasons for, newly developed rules. When the status quo is maintained in a controversial area of the law, the court will also have to elaborate on their judgment and explain why it chose not to opt for a change in the law.

D. – Representative court decisions

If we are to have a legal culture in which court decisions play a more visible and significant role, either in a system of precedent or mere gravitational force, it is a precondition that these decisions are actually available for consultation. It is difficult to see how unpublished judicial rulings can play a role in the development of the law. Obviously, where case law merely involves routine decisions, the fact that a court decision is not published does not give rise to insuperable problems in this regard. However, where a particular decision adds something to our knowledge of the law, this will definitely be the case.

In 1994 Storme pointed out that of the 500,000 decisions which were made annually in Belgium at the time, barely one percent was published (34). By themselves, these figures amount to no more than a fact which presents very little normative significance. However, Storme added that, in his view, the published case law was not representative. Such a state of affairs is of course not desirable.

Since 1994, we have seen a lot of change. For example, an annual report, which has already been referred to, is issued by the Belgian Supreme Court. In it, the Court indicates which of its decisions

(34) M. Storme, «Recht op recht. Overpeinzingen van de directeur van een juridisch tijdschrift», in *Feestbundel 30 jaar Tijdschrift voor Privaatrecht*, Brussel, Story-Scientia, 1994, X.

were, in the court's opinion, of significance. However, this development does not solve all problems in this regard. In the course of 2004, for example, the Supreme Court issued no fewer than 2,900 decisions. Although it would make sense to publish them all, this being a precondition if comprehensive public monitoring is to be made possible, it is at least as important that there should also exist an independent and authoritative publication which constitutes a *representative collection* of case law. And this is so because a full collection of non-representative court decisions could cause a great deal of uncertainty and confusion. To put it differently : there can also be too much case law published, which would result in the loss of a clear view on the relevant cases.

It would also be important to have a publication which provides a limited and representative picture of the lower court decisions. Even though the decisions of the higher courts (in particular those of the Supreme Court) are those which in practice will play an authoritative part in the development of the law, it is crucial to be able to consult the other court decisions as well, since the latter are capable of setting off new trends, and can show the extent to which they have accepted the case law of the higher courts.

E. – When are the courts allowed to depart from judicial decisions? Marginal assessment as a solution

Because there is a chance that court decisions are irrational, it must be permissible to depart from them (overruling). However, the stability of the legal system requires at the same time that court decisions are not disregarded too easily. Whether or not a decision should be overruled will therefore need to be assessed by criteria other than merely those of rationality. This fact confers a special character on the question as to the circumstances under which a court decision may be departed from.

On this question, it is interesting to consider the position in England where, ever since the well-known Practice Statement of 1966, the House of Lords became the only court capable of overruling a decision of its own (35). It appears that, as far as the House of

(35) *Practice Statement (Judicial Precedent)*, [1966] 1 *WLR* 1234.

Lords is concerned, the mere fact of a precedent being incorrect does not constitute a decisive reason for departing from a precedent (36). More has to be involved for this to happen. In more concrete terms, an overruling should also contribute towards a net improvement in the law, and the new decision must, in principle, be based on different grounds from those of the overruled decision. Accordingly, the House of Lords will not, in principle, proceed to overrule a decision where the reasons which are advanced to justify the new decision are the same as those which were used in order to arrive at the earlier decision. This will be the case where nothing of importance in the earlier decision had been disregarded in the opinion of the House, and where the context and the social conditions in which the precedent was created remain the same. Even if the current judges of the House of Lords are of the opinion that the precedent was incorrect, this is, according to this criterion, no more than evidence of the existence of two different opinions on the matter. This viewpoint appears to assume that, since opinions on precisely what is a good judgment differ, the doctrine of precedent should institutionalise a preference for formal values such as legal certainty, consistency, procedural economy, reliance, etc.

It seems that the fear experienced by the House of Lords is that, if the conditions specified above were not set, the relevant decisions would merely be subjected to an assessment as to their fairness or rationality, with the possible consequence that in the end only a collection of *ad hoc* decisions would remain, and the principle of legal certainty would be infringed upon drastically. This reasoning was also to be found in the opinion proffered by Lord Wilberforce in *Fitzleet Estates Ltd v. Cherry (Inspector of Taxes)* :

«Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearances of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. (....) It requires much more

(36) J.W. HARRIS, «Towards Principles of Overruling – When Should a Final Court of Appeal Second Guess?», *Oxford Journal of Legal Studies*, 1990, 135-199 and B.V. HARRIS, «Final appellate courts overruling their own 'wrong' precedents: the ongoing search for principle», *Law Quarterly Review*, 2002, 408-427.

than doubts as to the correctness of such opinion to justify departing from it.» (37)

Reasonable as the criteria used by the House of Lords to justify distinguishing from a previous case seem to be, the question still remains whether all this requires a system of binding precedent for all the courts but the House of Lords. Would the most important consideration underlying a strict and all pervasive system of binding precedents, i.e. establishing legal stability, be radically infringed upon if courts in general, so not just the House of Lords, would not be tied to a system of binding precedent? In 1944, when the practice of overruling was not yet officially permitted for the House of Lords itself, Lord Wright was already downplaying the argument of legal certainty used to justify rigid adherence to a system of *stare decisis* :

«There need be no fear that the whole system of precedents would be destroyed if this change [i.e. getting rid of binding precedent] were so made. The instinct of inertia is as potent in judges as in other people. (...) No Court will be anxious to repudiate a precedent. It will do so only when it is completely satisfied that the precedent is erroneous. (...) If the Court is so satisfied, it is a humiliation which ought not to be put upon it to reproduce and perpetuate the error. (...) Precedents would still be precedents, though not coercive but merely persuasive. If that were so, it may further be noted that there could not be the same urgency to carry to extremes the process of distinguishing from the then present case erroneous precedents.» (38) (39)

I am inclined to side with Lord Wright. The first reason for this is that, in present-day English practice, undesirable precedents are too frequently distinguished indeed, specifically by the lower courts, which results in legal uncertainty. Paradoxically enough, this serves to go against the main consideration (i.e. to create legal stability

(37) [1977] 3 *All ER* 999.

(38) Lord Wright, *l.c.*, 144.

(39) Nevertheless, in a decision issued in 2001 the House of Lords in its judicial capacity seems once again to have confirmed that it continues to adhere to the strict *stare decisis* doctrine (except for itself). The decision was made by five Law Lords, three of whom were of the opinion that the precedent on which the decision was ultimately based was incorrect. However, of those three judges, two were of the opinion that the decision in question was nevertheless binding. The main reason for this appears to have been once again that legal certainty is endangered where the mere incorrectness of a precedent would be sufficient reason to proceed to an overruling. See *R.v. Kansal* (No.2), [2001] 3 *WLR* 1562. On this B.V. Harris, *l.c.*, 409-410.

and certainty) which is used in order to advocate a strict doctrine of binding precedents for all the courts besides the House of Lords in its judicial capacity. More importantly, and secondly, there is a method which can serve the cause of legal stability without ending in the cramped and, in my view, far too conservative attitude of the House of Lords. My proposal is that the method of what we might call 'marginal assessment' could be a major tool in making possible a quality check of judicial decisions, thereby adhering to considerations of legal certainty without at the same time getting rid of the need to have the law evolve adequately. When applying this method, the court merely examines whether the decision in question could reasonably (taking into account all the interests involved) have brought about a certain result. Only if on that basis the court decision *appears* to be unreasonable, should it be subjected to a full examination as to the quality and rationality of its contents. Marginal assessment thus entails a presumption of rationality – which then gives rise to a presumption of correctness of the court decision under review – as long as its irrationality or unfairness is not too obviously on display. The presumption of correctness coupled with a marginal assessment procedure will entail a «benefit of the doubt.» In the end, this method merely examines whether certain limits, which are part of any concept of rationality, have not been exceeded. Ultimately, the method of marginal assessment takes into account that there exist several conceptions of a certain legal proposition that are perceived to be correct or rational. In concrete terms, this entails that for a specific court not to share the opinion of another court this does not constitute evidence of the «clear irrationality» of the court decision in question.

From this point of view the notion of «clear irrationality» is the conception of rationality which can no longer be recognised as such in the light of every other reasonable conception of rationality. This means that the rationality criterion as such is an ambiguous source of good or correct law (what is rational law?), that can nevertheless serve as a criterion of assessment. In other words, the notion of rationality is a concept which can be subject to different conceptions as to its contents; at the same time, although different conceptions of rationality exist, debating the quality of a court decision is still a useful practice.

V. – Conclusion

The main conclusions to be drawn from this article can be itemised as follows :

1. The central question of this article is : What role should judicial decisions play in the development of the law ? This question is relevant because something remarkable is going on when debating the status of court decisions in many civil law countries. Although in many countries, including Belgium, hardly any official or formal recognition is given to court decisions as a source of law, lawyers are referring to them in a way which suggests that they do have binding force. Can this paradox be explained, and if so, how ?

2. A distinction must be drawn between the so-called *force of precedent* of court decisions on the one hand, and their *gravitational force* on the other hand. In the case of force of precedent, we are dealing with the formally binding nature of previous court decisions. This is the position as it prevails in the majority of common law jurisdictions. The reasons in favour of the force of precedent (consistency, legal certainty, procedural economy and efficiency, and reliance) are all formal by nature in that they provide reasons for complying with court decisions in time. They have, however, no bearing on the contents of these decisions as such. The gravitational force of court decisions is based on the rationality of the court decision as such (i.e. the quality of the court decision). Viewed in this light, the gravitational force of court decisions follows logically from the rationality of the court decision, and gives rise to a presumption of the correctness of the court decision.

3. There is nothing in Belgian positive law which formally prevents the gravitational force of court decisions, although force of precedent is not allowed. There are, however, a number of provisions – more particularly provisions relating to appeal proceedings, applications to the Belgian Supreme Court and the so-called 'Supreme Court procedure in the interests of the law' – which indicate that the Belgian legal system in theory militates in favour of the gravitational force of court decisions. These provisions do not go so far as expressly confirming a system of gravitational force, but they do point in the same direction.

4. In Belgium, there is no need for a system of binding precedents. There is, however, a need for a culture in which court deci-

sions are expressly used. This is a culture in which the gravitational force of court decisions is recognised in fact, and in which court decisions are expressly involved in the court's reasoning processes. If the law can, amongst other things, be qualified as a culture of argumentation, the debate on the best or most rational solution to a legal dispute should expressly take place by means of well-argued and clearly expressed reasons (including a discussion of the rationality of relevant earlier decisions). There is in Belgium also a need for a rational system of publishing court decisions.

5. Because court decisions can be irrational, it must be possible to depart from them. However, the stability of the legal order makes it necessary to prevent just about every court decision from being disregarded. Accordingly, the assessment of a court decision will need to amount to more than merely assessing it as to its fairness or rationality : also factors such as legal certainty, procedural economy, reliance etc. should be assessed. The method of marginal assessment I introduced in this article should be capable of fitting in with this conception.